KAREN P. HEWITT
United States Attorney
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney
California State Bar No. 166022
880 Front Street, Suite 6293
San Diego, California 92101-8893
Telephone: (619) 557-7843
Christopher.Tenorio@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHRISTOPHER BLACK, Defendant.	**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SEVERANCE** CASE NO. 08CR0274(2)-LAB JUDGE: HON. LARRY A. BURNS COURT: COURTROOM 9 DATE: August 25, 2008 TIME: 2:00 p.m. TOGETHER WITH MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Christopher P. Tenorio, Assistant United States Attorney, and hereby files its response in opposition to Defendant's motion for severance. Said response is based upon the files and records of the case, together with the attached Memorandum of Points and Authorities.

//

//

//

//

//

//

I.

INTRODUCTION

The Government incorporates by reference its Statement of Facts provided in its previous Response in Opposition to Defendant's Motions, filed under separate cover.

II.

SEVERANCE IS NOT NECESSARY OR REQUIRED

A. Joinder is Appropriate Because the Charges Involve Evidence that is Inextricably Intertwined

Federal Rule of Criminal Procedure 8(b) provides for the joinder of defendants where they participated in the same series of acts or transactions constituting an offense or group of offenses. Defendant Arnold moves to sever the counts of the indictment. Rule 8(b) provides for the joinder of defendants where they participated in the same series of acts or transactions constituting an offense or group of offenses. Rule 8 has been construed in favor of initial joinder, whereas Rule 14 is available as a remedy for prejudice that may develop during trial. United States v. Jawara, 474 F.3d 565, 573 (9th Cir. 2007) (quotation omitted). Pursuant to Rule 8(a), at least one of the three conditions must be satisfied for proper joinder. See id. (citation omitted). Rule 8 (a) provides for the joinder of offense, as follows:

> The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Fed. R. Crim. P. 8(a).

//

Joinder is appropriate in this case because the evidence for the substantive counts are also charged as overt acts of the charged conspiracies. By definition the conspiracies constitute offenses "based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." See id. Further, all offenses must be proven together as both of the conspiracies involve Defendant Arnold. Joinder, therefore, is appropriate.

B. Defendants Should Not Be Severed Pursuant to Rule 14

Federal Rule of Criminal Procedure 14 provides:

> If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

A defendant requesting a separate trial from his co-defendant must demonstrate: (1) prejudice (that is, that a joint trial will compromise a specific trial right or otherwise prevent the jury from making a reliable judgment); and (2) that any prejudice was not cured by appropriate remedial measures at the trial level. Zafiro v. United States, 506 U.S. 534, 539 (1993); United States v. Mayfield, 189 F.3d 895, 906 (9th Cir. 1999).

Although Defendant Black raises the issue that mutually antagonistic defenses may emerge at trial, he provides no specific argument. As the following provides, Defendant Black cannot meet his burden to establish severance on the basis of potentially, yet undefined, antagonistic defenses.

//

//

//

1. Defendant Cannot Establish that Antagonistic Defenses Will Necessarily Emerge

Federal courts have consistently held that it is difficult to obtain severance on the basis of mutually antagonistic defense claims. United States v. Johnson, 297 F.3d 845 (9th Cir. 2002); see Zafiro, 506 U.S. at 538 (mutually exclusive defenses are rarely found). Severance is not necessarily required where there is antagonism between defenses or one defendant desires to exculpate himself by inculpating a co-defendant. United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996) (citation omitted); see also Zafiro, 506 U.S. at 540 ("[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.").

For a claim of antagonistic defenses to prevail, co-defendants must show that their defenses are "irreconcilable and mutually exclusive." United States v. Angwin, 271 F.3d 786, 795 (9th Cir. 2001). Defenses are mutually exclusive if "acquittal of one co-defendant would necessarily call for the conviction of the other." Id. (citation omitted); United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999); United States v. Gonzalez, 749 F.2d 1329, 1333-34 (9th Cir. 1984); see also United States v. Cruz, 127 F.3d 791, 799-800 (9th Cir. 1997) (holding that reasonable doubt defense is "not irreconcilable" with innocent bystander defense). Additionally, for severance to be warranted on the grounds of antagonistic defenses, defendants' respective defenses must be so antagonistic that the jury, in order to believe the defense on one defendant, must necessarily disbelieve the defense of the other defendant. United States v. Mayfield, 189 F.3d 895, 899 (9th Cir. 1999); see also, Throckmorton, 87 F.3d at 1072 (holding that a defendant must demonstrate the irreconcilable nature between his core defense and his co-defendant's defense to be entitled to severance).

Defendant Black cannot show that the defenses are "truly mutually exclusive." He has identified no statements by co-defendants that are inconsistent with his innocence. At the very least, his argument does not overcome the presumption in favor of joinder in this case. See United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980); Fed. R. Crim. P. 8(b).

2. Defendant Will Not Be Unduly Prejudiced by Joinder

Defendant Black argues that prejudice will result from his inability to cross-examine co-defendants regarding statements they made if they elect not to testify. His concern is unjustified.

The admission of a hearsay statement of a non-testifying co-defendant violates a defendant's rights under the Confrontation Clause only when that statement facially, expressly, clearly, or powerfully implicates the defendant. Bruton v. United States, 391 U.S. 123, 135-36. The Ninth Circuit has repeatedly held that the Bruton principle operates only to exclude those statements which are "powerfully incriminatory," "expressly implicate," or "clearly inculpate" the defendant. United States v. Peterson, 140 F. 3d 819, 823 (9th Cir. 1998), United States v. Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993); United States v. Arambula, 987 F.2d 599, 605 (9th Cir. 1993). A statement is not facially incriminating merely because it identifies a defendant, however. United States v. Angwin, 271 F.3d 786, 796 (9th Cir. 2001). The statement must also have "a sufficiently devastating or powerful inculpatory impact to be incriminatory on its face." Id. (citations omitted). A co-defendant's statement that does not incriminate the defendant unless linked with other evidence introduced at trial does not violate the defendant's Sixth Amendment rights. Richardson v. Marsh, 481 U.S. 200, 208 (1987); United States v. Hoac, 990 F.2d 1099, 1105 (9th Cir. 1993). Such attenuated evidence is inherently less prejudicial. Richardson, 481 U.S. at 208.

Defendant Black has not identified any specific statements by co-defendants in the present case that are facially incriminatory. Unless and until he can make such a showing, his motion should be denied.

3. Defendant Has Not Identified Exculpatory Evidence

Where a defendant moves for a severance under Rule 14 because they wish to testify on some counts but not others, the defendant "must show that he has important testimony to give on some counts and a strong need to refrain from testifying on those he wants severed." Whitworth, 856 F.2d at 1277; United States v. DiCesare, 765 F.2d 890, 898 (9th Cir.), modified on other grounds, 777 F.2d 543 (1985) (citing United States v. Nolan, 700 F.2d 479, 483 (9th Cir. 1983)). A defendant is not entitled to severance, however, where they make no such showing in their moving papers and fail to list "the specific testimony he will present about one offense, and his specific reasons for not testifying about others." Id. (citation omitted). The same principle should apply in cases, such as here, where the defendant seeks to present exculpatory evidence of the co-defendant. Because Defendant Black has not presented a necessary affidavit to support his argument, his motion should be denied as unripe. See United States v. Vigil, 561 F.2d 116 (9th Cir. 1977).

//

//

III.

CONCLUSION

Based on the foregoing, the Court should deny Defendant's motion for severance.

DATED: August 19, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHRISTOPHER BLACK, Defendant.	**CERTIFICATE OF SERVICE** CASE NO. 08CR0274(2)-LAB JUDGE: HON. LARRY A. BURNS COURT: COURTROOM 9

IT IS HEREBY CERTIFIED that:

I, CHRISTOPHER P. TENORIO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION FOR SEVERANCE** on Defendant's attorneys by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them. I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 2008 Respectfully submitted,

s/ Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney